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Supreme Court, U.S.
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No. 02-464

In The Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the nature of the issues to be considered by this Court:

Did the Montana Supreme Court correctly hold (in accordance with its own and with this Court's precedent and in accordance with Montana's established history of deference to tribal authority on matters of essential importance to tribes and their members) that Montana was precluded from enforcing a state licensing tax on an Indian-owned family farm doing business in Indian country and exclusively on Indian-owned lands, when the farm was also incorporated under the laws of the State of Montana?

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I. STATEMENT OF THE CASE

Petitioner's brief contains certain allegations of fact and law which are inaccurate or are, at the very least, misleading. Pursuant to Supreme Court Rule 15(2), respondent offers the following corrections to the record:

- Petitioner alleges that "Mr. and Mrs. Murray are both Indians, though only Mr. Murray is an enrolled member of the Fort Peck Tribes. . . . " Petition for Writ of Certiorari ("Pet. for Cert.") 4. In fact, Mrs. Murray is also an enrolled Indian person. She is an enrolled member of the Turtle Mountain Chippewa. Stip. Facts ¶ 3 (P. App. 29).[1] The Turtle Mountain Chippewa are served by the Fort Peck Reservation. *Id.*

- Petitioner alleges that " . . . some of the land leased by (Flat Center Farms) is land owned by the Tribe, some being trust land." Pet. 5. In fact, all lands operated by Flat Center Farms are Indian-owned. Stip. Facts ¶ 7 (P. App. 30). The bulk of the lands operated by Flat Center Farms are held in trust by the United States for various Indian individuals and for the Tribes. *Id.*

- Petitioner alleges that the Roosevelt County District Court based its conclusion that Flat Center Farms is exempt from the state license tax on two factors. Pet. 6. These two factors, according to petitioner, were "that the operations (of Flat Center Farms) were on the reservation and the beneficiaries of the corporate business were Indians." *Id.* In fact, the district court considered three factors, which are listed in the underlying opinion as follows:

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[1] P. App. connotes a citation to petitioner's appendix. Citations to respondent's appendix will be indicated by a citation to R. App.

1) The beneficiaries of the income whether corporate or personal are ultimately Indian persons;

2) The situs of the activity generating the income is wholly within the reservation; and

3) The assets generating the income are Indian trust lands.

P. App. 25-26.

- Petitioner characterizes the decision of the Montana Supreme Court as grounded in "its understanding of federal Indian law." Pet. 11. The decision below was actually based largely on the Montana Supreme Court decision in *LaRoque v. State of Montana*, 583 P.2d 303 (Mont. 1978). As respondent will explain in more detail below, neither the *LaRoque* decision nor the *Flat Center Farms* decision are in conflict with the jurisprudence of this Court. However, *LaRoque* and *Flat Center Farms* both reflect Montana's established policy of deference to tribal sovereignty.

II. REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT BETWEEN THE *FLAT CENTER FARMS* OPINION AND ANY OTHER PUBLISHED OPINION FROM EITHER ANY FEDERAL APPELLATE COURT OR THE HIGHEST APPELLATE COURT OF ANY STATE.

1. *Baraga* Is Not Binding Authority And Furthermore Is Not In Conflict With *Flat Center Farms*.

In an unpublished decision, the Sixth Circuit held that a corporation, which was founded primarily by

non-Indians but which was eventually wholly Indian-owned, was subject to state tax. *Baraga Prods., Inc. v. Michigan Comm'r of Revenue*, 156 F.3d 1228, 1998 WL 449674, *1 (6th Cir. 1998).[2] Petitioner contends that the *Baraga II* opinion is in direct conflict with the *Flat Center Farms* opinion on an important issue of federal law. For several reasons, this argument is flawed.

Unpublished decisions issued by the Sixth Circuit are not intended as binding authority:

> Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

6th Cir. R. 28(g) (R. App. 1).

In determining whether an opinion should be published, and should therefore have significant precedential value, the Sixth Circuit considers numerous and exhaustive factors:

1) Whether (the opinion) establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

2) Whether (the opinion) creates or resolves a conflict or (sic) authority either within the

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[2] For purposes of clarity, this opinion will be referred to as "*Baraga II*," and the district court opinion below, *Baraga Prods., Inc. v. Comm'r of Tax Revenue*, 971 F.Supp. 294 (W.D. Mich. 1997), will be referred to as "*Baraga I*."

circuit or between (the Sixth Circuit) and another;

3) Whether (the opinion) discusses a legal or factual issue of continuing public interest;

4) Whether (the opinion) is accompanied by a concurring or dissenting opinion;

5) Whether (the opinion) reverses the decision below, unless:

   A) the reversal is caused by an intervening change in law or fact; or,

   B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

6) Whether (the opinion) addresses a lower court or administrative agency decision that has been published; or

7) Whether (the opinion) is a decision that has been reviewed by the United States Supreme Court.

6th Cir. R. 206 (R. App. 2).

The judgment exercised by the Sixth Circuit Court of Appeals in designating the *Baraga II* opinion as unpublished should not be taken lightly. This choice is an expression on the part of the Court of Appeals that the opinion should not be regarded as the last word on the issues which the Court addressed, and should therefore not be relied upon as binding authority. Indeed, in determining whether to publish its decision, the Sixth Circuit necessarily considered whether the issues presented in *Baraga II* were of "continuing public interest." *Id.* at (3).

The *Baraga* opinions are also distinguishable on their facts. In these cases, the subject corporation was founded by four initial stockholders, only one of whom was Indian. Thus, the corporation was 75% owned by non-Indians at its inception. 1998 WL 449674 at *1. The State of Michigan began collecting taxes in 1984, but the corporation was not fully Indian-owned until 1993. *Id.*; 971 F.Supp. at 295. This is in sharp contrast to the case at bar. At its inception, and even before incorporation, Flat Center Farms was an Indian-owned business. Stip. Facts ¶ 8 (P. App. 30).

Furthermore, as the Montana Supreme Court noted, it is not clear from the record whether the entirety of Baraga's business operations were conducted on-reservation. P. App. 9. Flat Center Farms has always operated on the Fort Peck Reservation. *Id.* at ¶ 6. (P. App. 29).

2. *Airvator* Is Factually Distinct

Petitioner asserts that the *Flat Center Farms* opinion conflicts with a published opinion issued by the North Dakota Supreme Court. *See Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983). Like *Baraga II*, *Airvator* is materially distinguishable from the case at bar.

First, *Airvator* is not a case which addresses the scope of a state's authority to tax Indian commerce. *Airvator* involved a suit brought by a non-Indian corporation against a corporation which was partially Indian-owned. In order to determine whether the trial court had jurisdiction over the parties, the North Dakota Supreme Court was called upon to define the term "Indian." 329 N.W.2d at 600-01. The Court concluded that a state-chartered

corporation doing business in Indian country was not an "Indian" entity such that state jurisdiction was precluded. *Id.* at 602. Significantly, the Court did not reach the question of federal preemption for tax purposes.

The *Airvator* case also involved facts which differed substantially from those at issue in the *Flat Center Farms* matter. In *Airvator*, the company seeking "Indian" status was 51% Indian-owned. *Id.* at 600. By contrast, Flat Center Farms is wholly-owned by enrolled Indian stockholders. Stip. Facts ¶ 4 (P. App. 29). Moreover, the *Airvator* opinion does not reveal whether all business conducted by the subject corporation was conducted in Indian country, nor whether the subject corporation was tribally-chartered. Flat Center Farms is a tribally-chartered company operating on land which is exclusively Indian-owned and which is wholly situated within the external boundaries of the Fort Peck Reservation. *Id.* at ¶¶ 2, 6, 7 (P. App. 29-30).

Finally, and of great significance, the analysis in *Airvator* regarding "Indian" status did not rest primarily on the jurisprudence of this Court. Instead, the Supreme Court of North Dakota relied heavily on state law and on Felix S. Cohen's seminal, if substantially outdated, *Handbook on Federal Indian Law*.[3] *See, e.g.*, 329 N.W.2d at 602 ("We agree with the statements in Cohen that, for purposes of jurisdictional analysis, state-chartered corporations should be treated as non-Indians independent of their percentage of Indian shareholders.")

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[3] F. Cohen, *Handbook on Federal Indian Law* (1982 ed.).

Petitioner's assertions notwithstanding, *Airvator* does not reach an "important question of federal law" as required under Supreme Court Rule 10(b).

B. THERE IS NO CONFLICT BETWEEN THE *FLAT CENTER FARMS* OPINION AND ANY RELEVANT DECISION OR DECISIONS OF THE UNITED STATES SUPREME COURT.

The case at bar is factually distinct from all other Supreme Court cases which address the states' authority to tax commerce occurring in Indian country. Flat Center Farms is an Indian entity doing business solely in Indian country. This family-owned business is inextricably linked with the Fort Peck Tribe and with the Fort Peck Reservation. To characterize the facts to the contrary is, as the District Court below indicated, an elevation of "form over substance." P. App. 26. The stipulated facts which establish Flat Center Farms as a Fort Peck Indian entity are as follows:

- Flat Center Farms is co-owned by Kim and Denise Murray, each of whom have a 50% ownership interest in the farm. Stip. Facts ¶ 4 (P. App. 29).
- Denise and Kim Murray are a married couple. *Id.* at ¶ 3.
- Kim Murray is an enrolled member of the Fort Peck Tribes. *Id.*
- Denise Murray is an enrolled member of the Turtle Mountain Chippewa. *Id.*
- The Turtle Mountain Chippewa are served by the Fort Peck Reservation. *Id.*

- Flat Center Farms operates solely on land which is owned by Fort Peck Indians or which is held in trust for the Fort Peck Tribes or for individual tribal members. *Id.* at ¶ 7 (P. App. 30).
- All land farmed by Flat Center Farms exists within the exterior boundaries of the Fort Peck Reservation. *Id.* at ¶ 6 (P. App. 29).
- Flat Center Farms' sole business activity is farming. *Id.* at ¶ 5 (P. App. 29).
- The lands currently farmed by Flat Center Farms were previously farmed by Kim Murray individually. When these lands were farmed by Kim Murray individually, rather than by his Indian-owned small business, the income from his farming operation was tax-exempt. *Id.* at ¶ 8 (P. App. 30).
- Flat Center Farms is a tribally-chartered corporation. *Id.* at ¶ 2 (P. App. 29).

Flat Center Farms is owned by, and run by, an enrolled member of the Fort Peck Tribe and an enrolled member of a tribe with a recognized beneficiary relationship to the Fort Peck Tribe. Flat Center Farms exists on the Fort Peck Reservation and exclusively farms land owned by the Tribe or held in trust for the Tribe and its members. The State of Montana argues that because Flat Center Farms is *also* state incorporated, that it should be subject to state taxation. There is no jurisprudence from this Court which so mandates. Petitioner relies on cases which are materially distinguishable from the case at bar.

For example, petitioner cites to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). *Colville* is not in conflict with this case. In

Colville, this Court determined that the State of Washington could properly tax cigarette purchases where the transactions occurred on-reservation *but the consumers were not members of the reservation's governing tribe*. 447 U.S. at 160 (emphasis added). Significantly, *Colville* involved tribal commerce designed to attract non-Indian and non-reservation consumers. *Id.* at 155. In the same decision, this Court struck down a Washington State vehicle tax to the extent it was applied to reservation-Indians, even when those vehicle owners used their vehicles, in part, off-reservation. *Id.* at 163.

Similarly, the decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), is not in conflict with the case at bar. In *Oklahoma Tax Comm'n*, this Court held that the State of Oklahoma could properly tax tribal members who worked for the tribe *but who resided off-reservation*. 515 U.S. at 453 (emphasis added). In the same decision, this Court struck down an Oklahoma tax on motor fuel sold by the Chikasaw tribe on-reservation. *Id.* In so holding, the Court noted that the "legal incidence" of the motor fuel tax fell on the tribe.

Petitioner also relies on the case of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). *Cotton Petroleum* is not in conflict with the case at bar. In *Cotton Petroleum*, this Court affirmed the right of the State of New Mexico to tax the production of oil and gas by *non-Indian lessees* of wells located on-reservation. 490 U.S. at 186 (emphasis added).

Finally, petitioner attempts to compare the case at bar with the matter of *Arizona Dep't. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999). In *Blaze*, this Court held that the State of Arizona could tax a company which was

owned by a member of the Blackfeet Tribe and which had contracted with the Federal Government to perform work on various reservations. 526 U.S. at 39. Significantly – and in sharp contrast to the case at bar – *none of Blaze's work was performed on the Blackfeet reservation. Id.* at 34 (emphasis added).

The holding of the Montana Supreme Court is consistent with each of the above cases and is also consistent with this Court's benchmark decision in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). In *McClanahan*, this Court held that a State may not impose a tax on "reservation Indians with income derived solely from reservation sources." 411 U.S. at 165.[4] None of the cases cited by Petitioner suggest that Flat Center Farms should be treated as anything other than a reservation-Indian entity for purposes of State taxation.

The State has not sought to tax Flat Center Farms for the time period after the business became tribally-chartered. This appears to be an implicit concession that Flat Center Farms became a Fort Peck Indian entity at the time of Tribal incorporation. The State cannot credibly suggest that the mere fact of tribal incorporation somehow changed Flat Center Farms from a non-Indian to an Indian entity.

In fact, Flat Center Farms has always been, and remains, a Fort Peck Indian entity. As such, Flat Center

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[4] A State may tax this type of income if Congress specifically authorizes such a tax. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). However, there is no issue of Congressional authorization in the case at bar.

Farms is not subject to state taxation. The Montana Supreme Court has simply stated the obvious, and in doing so has created no conflict with the jurisprudence of this Court.

C. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUPPORT THE MONTANA SUPREME COURT'S DECISION.

1. The Montana Supreme Court appropriately relied on state law in reaching its decision.

In *Flat Center Farms*, the Montana Supreme Court determined that Indian sovereignty is a bar to the state taxation of an Indian-owned business operating in Indian country when the business is also state-licensed. This Court should defer to the Montana Supreme Court's conclusions regarding the relationship between the State of Montana and the Indian population of that state.

While the *Flat Center Farms* opinion is not in conflict with Federal Indian law, the Montana Supreme Court relied heavily on its own jurisprudence in reaching the conclusion that Flat Center Farms is exempt from Montana's business license tax. Because the Montana court relied upon a long line of cases, and because this reliance on state law is important, the relevant passage from the *Flat Center Farms* opinion is herein quoted in full:

> The point here is that the State should not be presumed to wield the sword of on-reservation tax authority absent an express Congressional provision. *While we have not previously addressed the precise issue in this case, this Court*

> *has repeatedly recognized the need to promote tribal self-determination by deferring to tribal authority on matters of essential importance to tribes and their members. See, e.g., In re Marriage of Skillen*, 1998 MT 43, ¶ 41, 287 Mont. 399 ¶ 41, 956 P.2d 1, ¶ 41 (recognizing tribal sovereignty and the right of self-government include authority to control the internal relations of tribal members); *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, ¶ 36, 291 Mont. 196, ¶ 36, 967 P.2d 398, ¶ 36 (holding that Montana courts lack subject matter jurisdiction over debt collection action brought by non-Indian creditor whose rights arose on reservation); *In re Adoption of Riffle* (1995), 273 Mont. 237, 242, 902 P.2d 542, 545 (holding that the tribe is the ultimate authority on eligibility for tribal membership). Furthermore, we have considered whether tribal membership is critical to a determination of whether the State can tax income earned by Indians on tribal land. *See LaRoque v. State* (1978), 178 Mont. 315, 583 P.2d 1059 (holding that tribal membership was not determinative).

P. App. 7 (emphasis added; citations as they appear in original).

Further evidence of Montana's intent to decide the Flat Center Farms case against the unique backdrop of state law and policy can be found in the Court's treatment of the *Baraga I* opinion.[5] In distinguishing *Baraga I*, the Montana Supreme Court noted that "the precise language

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[5] Perhaps in recognition of the fact that *Baraga II* was unpublished, the Montana Supreme Court reserved its comments to the analysis set forth in *Baraga I*.

of the Michigan business tax" at issue before the federal district court was not apparent from the *Baraga I* opinion. P. App. 9. In focusing on this factual distinction, the Montana court implicitly emphasized the fact that the reach of a state taxation scheme directly flows from the law of that particular state.

Montana has adopted numerous pieces of legislation which serve to protect its Indian residents from the excessive reach of state taxation. *See, e.g.*, Mont. Code Ann. § 15-72-104(3)(b) (no state taxation of electricity produced on-reservation for delivery outside the state) (R. App. 4); Mont. Code Ann. § 16-11-111 (no state taxation of cigarette sales to Indian consumer if the sale is made on the consumer's reservation) (R. App. 5); Mont. Code Ann. § 18-11-101 (statement of policy which seeks to "prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.") (R. App. 7).

In addition to its laws regarding the imposition of state taxes in Indian country, Montana has adopted law and policy which promote tribal sovereignty generally. *See, e.g.*, Mont. Code Ann. § 90-11-101 (legislative policy promoting Indian sovereignty) (R. App. 9); Ch. 309, L. 1981, preamble (HB 25) (codified at Mont. Code Ann. §§ 18-11-101 *et seq.*) (promoting relationship between the state and the Tribes that is based on "mutual consent and mutual benefit.") (R. App. 8).

The Montana Supreme Court relied heavily on its own jurisprudence in determining that the state was barred from imposing its licensing tax on Flat Center Farms. This decision was in harmony with not only the Montana Supreme Court's prior rulings, but also with the legislative

scheme in force in Montana. The Montana Supreme Court has not created a conflict with this Court's jurisprudence, nor with the jurisprudence of any other state supreme court or federal appellate court, on any important issue of federal law. The Montana Supreme Court's decision interpreting state law and affecting state citizens should not be disturbed.

2. The result achieved by the Montana Supreme Court did not differ from the result which would have been reached in explicit reliance on this Court's jurisprudence.

Petitioner argues that the Montana Supreme Court erred in failing to apply the "legal incidence" test as set forth in *Oklahoma Tax Comm'n*. Under *Oklahoma Tax Comm'n*, a state tax cannot be enforced –absent Congressional authorization – if the legal incidence of the tax "rests on a tribe or on tribal members for sales made inside Indian country." *Id.* "But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax." *Id.*

While the Montana Supreme Court did not explicitly cite the "legal incidence test" set forth in *Oklahoma Tax Comm'n*, the result would have been the same even if it had. Under *Oklahoma Tax Comm'n*, the judiciary is called upon to evaluate the "legal incidence" of a tax in order to determine whether the tax burdens Indian or non-Indian taxpayers. 515 U.S. at 458. Here, the Montana Supreme Court concluded, in essence, that the legal incidence of the Montana tax fell solely on Indian taxpayers. The Montana Supreme Court applied the "legal situs" test first adopted in *LaRoque v. State of Montana*, 583 P.2d 1059 (1978), in

reaching this conclusion. However, as explained more fully in Section II.B., *supra*, the Montana Supreme Court's conclusions are not in conflict with any of this Court's jurisprudence. Indeed, while not as artfully stated, the "legal situs" test mirrors in substance the "legal incidence" test set forth by this Court in *Oklahoma Tax Comm'n*. It is simply wrong to suggest that Flat Center Farms is, in substance, anything other than a Fort Peck Indian entity. As such, the legal incidence of Montana's business license tax falls on an impermissible party.

D. THE LIMITED NATURE OF THE RECORD RENDERS THE *FLAT CENTER FARMS* OPINION POTENTIALLY INAPPLICABLE TO THE MAJORITY OF CORPORATIONS WHICH MIGHT OTHERWISE BE AFFECTED BY THE MONTANA COURT'S RULING

It is significant to note that Flat Center Farms is not only incorporated under the laws of the State of Montana, but is also a tribally-chartered corporation. Stip. Facts ¶ 2 (P. App. 29). It is true that during the time period relevant to this litigation, Flat Center Farms was incorporated only pursuant to state law. *Id.* However, the State failed to argue that point before the Roosevelt County District Court. *See* P. App. 23 (Gray, J., concurring). Because the State failed to make its record on this issue, and because this matter was litigated on stipulated facts, the State is bound by the record, which clearly establishes Flat Center Farms' status as a tribally-chartered corporation. *Id.* Thus,

the record supports the conclusion that Flat Center Farms does, in fact, have "Indian" status.[6]

This Court should not disturb the findings of the Montana courts. In the absence of exceptional circumstances, this Court defers to state court factual findings, even when those findings relate to a constitutional issue. *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

E. THE *FLAT CENTER FARMS* OPINION ADDRESSES AN ISSUE OF LAW WHICH IS WELL-SETTLED AND WHICH DOES NOT REQUIRE FURTHER CLARIFICATION BY THIS COURT.

Petitioner suggests that the Supreme Court of Montana erred in failing to apply explicitly the "legal incidence" test as set forth in *Oklahoma Tax Comm'n*. Respondent believes that the Supreme Court of Montana reached the correct result under both state and federal law. *See* Sections II.B and II.C, *supra*. However, the putative error of the Montana Supreme Court in failing to apply explicitly the test set forth in *Oklahoma Tax Comm'n*, would not require the intervention of this Court. The rule of the *Oklahoma Tax Comm'n* case is black letter law and does not require further clarification. The Court has made it clear that the rule of *Oklahoma Tax Comm'n* is a "categorical" one. *Id.* The failure of a state court to apply a clearly defined rule of federal law is not, in most cases, a basis for this Court to accept jurisdiction over an

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[6] Even the State appears to concede that tribal incorporation gives a business the status of an Indian entity. *See* Section III.B., *supra*.

appeal. There is no compelling reason to grant a writ of certiorari in this case.

CONCLUSION

The Supreme Court of Montana reached the correct result in this matter. The *Flat Center Farms* decision was in keeping with the jurisprudence of this Court, and was in keeping with Montana's own jurisprudence regarding the sovereignty of its Indian population. The petition should be denied.

DATED this 23rd day of October, 2002.

Respectfully submitted,

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APPENDIX

Sixth Circuit Rule 28 provides in relevant part:

(g) Citation of Unpublished Decisions. Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

Sixth Circuit Rule 206 provides:

(a) Criteria for Publication.

The following criteria shall be considered by panels in determining whether a person will be designated for publication in the Federal Reporter:

(1) whether it establishes a new rule of law, or alters or modifies and an existing rule of law, or applies an established rule to a novel fact situation;

(2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

(3) whether it discusses a legal or factual issue of continuing public interest;

(4) whether it is accompanied by a concurring or dissenting opinion;

(5) whether it reverses the decision below, unless:

(A) the reversal is caused by an intervening change in law or fact, or

(B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court.

(6) whether it addresses a lower court or administrative agency decision that has been published; or,

(7) whether it is a decision that has been reviewed by the United States Supreme Court.

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinion Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

Section 15-72-104 of Montana Code Annotated provides in pertinent part that:

(b) Electricity produced in the state by any agency of the United States government or electricity produced from an electric energy generation facility, as defined in 90-5-101(3), constructed after May 1, 2001, that is within the exterior boundaries of a Montana Indian reservation for delivery outside of the state is exempt from the tax imposed by this section.

Section 16-11-111 of Montana Code Annotated provides:

16-11-111. Cigarette sales tax – exemption for sale to tribal member

(1) (a) A tax on the purchase of cigarettes for consumption, use, or any purpose other than resale in the regular course of business is imposed and must be precollected by the wholesaler and paid to the state of Montana. The tax is 18 cents on each package containing 20 cigarettes and, when packages contain other than 20 cigarettes, a tax on each cigarette equal to 1/20th the tax on a package containing 20 cigarettes.

(b) The tax computed under subsection (1)(a) applies to illegally packaged cigarettes under 16-11-307.

(2) The tax imposed in subsection (1) does not apply to quota cigarettes.

(3) Subject to the refund or credit provided in subsection (4), the tax must be precollected on all cigarettes entering a Montana Indian reservation.

(4) Pursuant to the procedure provided in subsection (5), a wholesaler making a sale of cigarettes to a retailer within the boundaries of a Montana Indian reservation may apply to the department for a refund or credit for taxes precollected on cigarettes sold by the retailer to a member of the federally recognized Indian tribe or tribes on whose reservation the sale is made. A wholesaler who does not file a claim within 1 year of the shipment dates forfeits the refund or credit.

(5) The distribution of tax-free cigarettes to a tribal member must be implemented through a system of

preapproved wholesaler shipments. A licensed Montana wholesaler shall contact the department for approval prior to the shipment of the untaxed cigarettes. The department may authorize sales based on whether the quota, as established in a cooperative agreement between the department and an Indian tribe or as set out in this chapter, has been met. If authorized as a tax-exempt sale, the wholesaler, upon providing proof of order and delivery to a retailer within the boundaries of a Montana Indian reservation selling cigarettes to members of a federally recognized tribe or tribes of that reservation, must be given a credit or refund. Once the quota has been filled, the department shall immediately notify all affected wholesalers that further sales on that reservation must be taxed and that a claim for a refund or credit will not be honored for the remainder of the quota period. Quota allocations are not transferable between quota periods or between reservations.

(6) The total amount of refunds or credits allowed by the department to all wholesalers claiming the refund or credit under subsection (4) for any month may not exceed an amount that is equal to the tax due on the quota allocation. The department shall determine the amount of refunds or credits for each Indian reservation at the beginning of each fiscal year, using the most recent census data available from the bureau of Indian affairs or as provided in a cooperative agreement with the tribe or tribes of the Indian reservation.

Section 18-11-101 of Montana Code Annotated provides:

18-11-101. Short title – purpose

(1) This chapter shall be known and may be cited as the "State-Tribal Cooperative Agreements Act".

(2) It is the intent of the legislature that this part be used to promote cooperation between the state or a public agency and a sovereign tribal government in mutually beneficial activities and services.

(3) It is the goal of the legislature to prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.

Ch. 309, L. 1981, preamble (HB 25) (codified at Mont. Code Ann. §§ 18-11-101, *et seq.*) provides:

WHEREAS, it is in the best interest of the State of Montana to establish a legal framework that will enable this state, its political subdivisions, and Indian tribes to achieve maximum harmony and facilitate cooperative efforts in the orderly administration of their respective governments; and

WHEREAS, it is in the best interest of the state of Montana to establish a legal framework for viable agreements between itself and tribal governments located in Montana that are based on mutual consent and mutual benefit; and

WHEREAS, it is in the best interest of the state of Montana to permit public agencies to make the most efficient use of their powers by enabling them to cooperate with tribal governments on a basis of mutual benefit and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of public agencies and local communities.

Section 90-11-101 of Montana Code Annotated provides:

The legislature finds and declares that:

(1) a considerable portion of the citizens of the state of Montana are American Indians;

(2) since statehood, Indian citizens of the state of Montana have lived on reservations set apart for those purposes by the United States of America, and by virtue of their isolation and supervision by the federal government, great problems of economic and social significance have arisen and presently exist;

(3) the best interests of Montana Indian tribes will be served by engaging in government-to-government relationships designed to recognize the rights, duties, and privileges of full citizenship that Indians are entitled to as citizens of this state;

(4) because the tribes are domestic dependent nations, agencies of the federal government retain jurisdiction and fiduciary duty throughout the state of Montana for the administration of economic, social, health, education, and welfare programs for Indians;

(5) unique differences exist between the tribes, their reservations, customs, treaties, and their respective relationships with the federal government, all of which influence the relationships among tribes and between the tribes and the state;

(6) there are sizeable numbers of off-reservation enrolled and unenrolled Indians residing in our state whose needs for social, environmental, educational, and

economic assistance are borne in part by state and local agencies;

(7) programs of the state of Montana should not duplicate those supported by agencies of the federal government or tribal governments with regard to jurisdiction of Indian people, because state responsibility includes off-reservation Indians and because those Indians require assistance to coordinate their affairs with various tribal groups and federal agencies where they have no official recognition;

(8) the state and the tribes working together in a government-to-government relationship and engaging in compacts and other cooperative agreements for the benefit of Indian and non-Indian residents will promote economic development, environmental protection, education, social services support, and enduring good will;

(9) to facilitate the discussion and resolution of issues and concerns that Indian tribes have in relation to the state, the federal government, and among themselves, the coordinator of Indian affairs shall:

(a) maintain effective tribal-state communications;

(b) assess tribal and individual Indian concerns and interests to seek ways and means of communicating these concerns and interests to relevant state agencies and to the legislature and actively assist in organizing these efforts; and

(c) act as a liaison for tribes and Indian people, whether the Indian people reside on or off reservations, whenever assistance is required;

(10) the coordinator of Indian affairs shall endeavor to assist tribes to seek agreements between the state and tribes and to work toward a consensus among the tribes and other parties on shared goals and principles.